

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CLEVELAND BROWN; SANDRA BROWN,

Case No. 2:16-cv-02777-RFB-CWH

## Plaintiffs,

V.

THE BANK OF NEW YORK MELLON, *et al.*,

#### Defendants.

## ORDER

## I. INTRODUCTION

Before this Court comes Defendant The Bank of New York Mellon (“Defendant”’s Motion for Summary Judgment (ECF No. 28) and Plaintiffs Cleveland Brown and Sandra Brown (collectively, “Plaintiffs”)’ Motion for Summary Judgment (ECF No. 30). For the reasons discussed below, the Court denies both Motions.

## II. BACKGROUND

The Court incorporates the procedural and factual background set forth on the record during its August 7, 2017 hearing on the matter, and briefly adds the following. During the prior hearing, the Court opened discovery for a period of sixty days, and ordered dispositive motions to be filed by October 23, 2017. (ECF No. 24). The parties were ordered to brief the narrow issue of whether Defendant provided proper notice pursuant to Nevada Revised Statute (“NRS”) § 107.080, for the purpose of the Court ruling on Plaintiffs’ request for declaratory relief. The parties received extensions of time and filed their Motions for Summary Judgment on November 2, 2017 and November 3, 2017. (ECF Nos. 28, 30). Both parties filed Responses on November 17, 2017.

1 (ECF Nos. 31, 32). On November 27, 2017, the parties each filed Replies. (ECF Nos. 33, 34). The  
2 Court held a hearing on the instant Motions on July 16, 2018, and took the matter under  
3 submission. This Order now follows.

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5 **III. LEGAL STANDARD**

6 Summary judgment is appropriate when the pleadings, depositions, answers to  
7 interrogatories, and admissions on file, together with the affidavits, if any, show “that there is no  
8 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
9 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering  
10 the propriety of summary judgment, the court views all facts and draws all inferences in the light  
11 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.  
12 2014). If the movant has carried its burden, the non-moving party “must do more than simply show  
13 that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a  
14 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine  
15 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (quotation marks  
16 omitted). It is improper for the Court to resolve genuine factual disputes or make credibility  
17 determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th  
18 Cir. 2017) (citations omitted).

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20 **IV. FACTUAL FINDINGS**

21 **A. Undisputed Facts**

22 The Court finds the following facts to be undisputed. Plaintiffs are the current owners of  
23 record of real property commonly known as 5070 Rustic Ridge Dr., Las Vegas, NV 89148 and  
24 more particularly described as follows: SPANISH HILLS EST UNIT 4 AMD, PLAT BOOK 109  
25 PAGE 35, LOT 3 BLOCK 8, APN: 163-29-514-001 (“the Subject Property”). On or about August  
26 1, 2005, Plaintiffs made, executed and delivered to non-party Sahara Mortgage Corporation  
27 (“Sahara”) a certain Deed of Trust dated August 1, 2005 (“the Deed of Trust”) in connection with  
28 a mortgage loan on the Subject Property for the principal amount of \$1,287,000 (“the Loan”). The

1 Deed of Trust was recorded in book number 20050817 as instrument number 0001134 in the  
2 Official Records of the Clark County Recorder's Office (the "Official Records") on August 17,  
3 2005.

4 On or about May 1, 2008, a default occurred under the terms of the Loan, in that the  
5 Plaintiffs failed to make the regular monthly installment payments due on that date and all  
6 subsequent payment due dates. Defendant recorded the assignment of the underlying note and  
7 Deed of Trust on the Subject Property on or about April 25, 2011.

8 On or about May 20, 2013, non-party Bank of America<sup>1</sup> sent a letter to Plaintiffs stating  
9 that the underlying note was in default. While the letter stated the principal obligation and interest  
10 rate and late fees, it made no mention of the accrued interest on the note. On or about September  
11 1, 2015, non-party Bayview Loan Servicing ("Bayview"), on behalf of Defendant, sent Plaintiffs  
12 a correspondence stating that the delinquency on the note would be foreclosed. While the letter  
13 stated the principal obligation and interest rate and late charges, it made no mention of the accrued  
14 interest on the note.

15 On or about December 14, 2015, Defendant recorded a Substitution of Trustee listing non-  
16 party Sables LLC ("Sables") as the Trustee of the note. On or about February 23, 2016, Sables  
17 recorded a Breach and Election to Sell the Subject Property. Pursuant to the Breach and Election  
18 to Sell, the amount of arrears on the note was eight hundred sixteen thousand four hundred twenty-  
19 five dollars and eighty-eight cents (\$816,425.88). The Breach and Election to Sell does not state  
20 what amount of principal remained nor the amount of accrued interest remaining on the underlying  
21 note. The Affidavit of Authority attached to the Breach and Election to Sell states under penalty  
22 of perjury in subparagraph five that Plaintiffs had received a written statement showing "(iv) the  
23 amount of accrued interest and late charges." In February 2016, non-party Bayview, on behalf of  
24 Defendant, sent Plaintiffs an invoice with account information for the underlying note. The letter  
25 states the monthly interest charges on the note is \$4,769.00 and the outstanding principal is  
26 \$1,359,480.74.

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28 <sup>1</sup> Bank of America was originally named as a Defendant in this action, but was dismissed  
on the record at the Court's August 7, 2017 hearing.

1           Defendant also has in its possession a Notice of Default and Intent to Accelerate letter  
2 dated October 15, 2014 (“October 15, 2014 letter”), purportedly from Bayview. The letter has a  
3 Certified Mail receipt attached; however, the receipt does not have a signature of either Plaintiff.

4           **B. Disputed Fact**

5           The parties dispute whether Defendant sent, and Plaintiffs received, the October 15, 2014  
6 letter.

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8           **V. DISCUSSION**

9           As there has not yet been a foreclosure of the Subject Property, the Court issues this Order  
10 regarding whether Defendant substantially complied with the notice procedure set forth in NRS §  
11 107.080. Pursuant to NRS § 107.080(2)(c)(3), a Trustee’s power of sale may not be exercised until  
12 several conditions are fulfilled, such as a representative of the beneficiary or note holder sending  
13 the borrower a written statement which includes the following information:

- 14           (I) The amount of payment required to make good the deficiency in performance  
15 or payment, avoid the exercise of the power of sale and reinstate the terms and  
16 conditions of the underlying obligation or debt existing before the deficiency in  
17 performance or payment, as of the date of the statement;
- 18           (II) The amount in default;
- 19           (III) The principal amount of the obligation or debt secured by the deed of trust;
- 20           (IV) The amount of accrued interest and late charges;
- 21           (V) A good faith estimate of all fees imposed in connection with the exercise of the  
22 power of sale; and
- 23           (VI) Contact information for obtaining the most current amounts due . . .<sup>2</sup>

24           The Court is required to declare a sale void that does not “substantially comply” with the  
25 provisions of the NRS § 107.080 subchapter. NRS §107.080(5)(a).

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2           The Court refers to the 2013 version of the statute, as that was the year Plaintiffs began  
to receive correspondence regarding the Loan in default.

1        After reviewing the Motions and supporting exhibits, the Court concludes that summary  
2 judgment cannot be granted for either party. There is a genuine dispute of fact as to whether  
3 Defendant sent – and Plaintiffs received – the October 15, 2014 letter, which appears to be the  
4 only document produced in discovery that contains the amount of accrued interest. Defendant  
5 produces an affidavit from a document coordinator at Bayview attesting to her knowledge that this  
6 letter was sent to Plaintiffs, and Plaintiffs in their affidavits declare that they did not receive the  
7 letter. The Court is not in the position to resolve this factual dispute or make credibility  
8 determinations as to the competing affidavits at the summary judgment stage.

9        Furthermore, the Court is not persuaded by Defendant's argument that it substantially  
10 complied with the provisions set forth in NRS § 107.080. The 2013 amendments to the statute  
11 explicitly required a written statement containing certain information to be sent to the borrower,  
12 including the amount of accrued interest. The Court finds that the Nevada legislature specifically  
13 intended the written statement to include this information; that Defendant provided a toll-free  
14 number for Plaintiffs to call to request that information is insufficient given this clear language.  
15 The Court further finds that there is no evidence that Defendants have otherwise provided this  
16 specific information to Plaintiffs, outside of the disputed letter. This specifically enumerated  
17 information required by NRS § 107.080(2)(c)(3) is necessary for homeowners, particularly the  
18 delineation of the amount of accrued interest, which may be difficult for a homeowner to calculate.  
19 Therefore, the Court finds that substantial compliance cannot occur if the notice to the homeowner  
20 does not contain all of the statutorily required information.

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22              **VI. CONCLUSION**

23        For the reasons discussed above,

24        **IT IS ORDERED** that Defendant's Motion for Summary Judgment (ECF No. 28) is  
25 DENIED.

26        **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Summary Judgment (ECF No.  
27 30) is DENIED.

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1           **IT IS FURTHER ORDERED** that the parties submit a Proposed Joint Pretrial Order by  
2 July 30, 2018.

3           DATED: July 17, 2018.



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6           **RICHARD F. BOULWARE, II**  
7           United States District Judge

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